ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S CLAIM ON THE GROUND THAT IT WAS RES JUDICATA BECAUSE:

1. The previous actions asserted as bars, which were tried by the same judge were based on prejudice and bias and not on the merits of those cases. That prejudice and bias against the plaintiff tainted the rulings and affected the outcomes of the hearings and resulted in dismissals so that the plaintiff was denied a fair trial and a proper final decree on the merits of those cases; and as a consequence, those improper and tainted dismissals to which he objected, in the previous cases did not constitute final and fair judgements on the merits and therefore cannot be used to support a claim of res judicata.

2. The defense of res judicata has the burden of proving by a preponderance of the evidence that an issue was previously raised and decided in an appropriate court in a prior cause of action (Fodi's v. Rutherford, 26 Va. App. 466, 449, 495 S.E.2d 503, 505(1998)(Worrie v. Boze, 198 Va. 533, 538, 95 S.E.2d 192, 197 (1956); Commonwealth ex. rel. Gray V. Johnson, 7 Va. App. 614, 618, 376 S.E.2d 787, 789 (1989). But no such burden was met.

3. The defense of res judicata must prove the identity of: (1) the remedies sought: (2) the identity of the causes of action; (3) the identities of parties; and (4) the identity of the quality of the

persons for or against whom the claim is made (Highsmith v. Commonwealth, 25 Va. App. at 440, 489 S.E.2d at 241) defense has failed to meet that burden because there is neither an identity of the remedies sought nor an identity of the causes of action (Wright, 232 Va. at 222, 349 S.E.2d at 128), nor an identity of the quality of the persons for or against whom the claim is made.

4. It is well settled that res judicata may not be taken advantage of by demurrer where the pleading demurrer to does not show on its fact the existence of the matters relied on to support the application of the doctrine (Martin v. Martin, 167 Va. 206, 211, 212, 188 S.E. 148, 150)(30 Am. Jur., Judgements, Sec. 264, P.989; 50 C.J.S., Judgements, Sec 824, PP. 393, 394, 395, and cases cited). This is so because a demurrer stands or falls by what appears on the face of the pleading at which it is aimed. And so resort cannot be had to another pleading for the purpose of supporting the demurrer (6 Michie's Jurisprudence, Va. and W.Va., Demurrers, Sec. 26, P.24, and cases there cited), and yet Virginia Phototherapy, L.L.C., took advantage of demurrer to support the application of res judicata over plaintiff's objections.

5. The fact that the previous actions had been tried in the same court by the same judge did not dispense with the necessity of proof of the records in the previous actions. To sustain a claim of res judicata the court will not take judicial notice of the record in the first suit (30 Am. Jur., Judgements, Sec. 273, P. 993; 50 C.J.S., Judgements, Sec. 836, P. 404.) It is appropriate to point out that ordinarily to sustain the allegation of res judicata, the whole

record of the former proceeding must be put in evidence (See Freeman on Judgements, 5th Ed., Sec. 1030, PP. 2147, 2148; Jones' Commentaries on Evidence, 2d Ed., Sec. 1886, P. 3514; 30 Am. Jur., Judgements, Sec. 274, P. 993; 50 C.J.S., Judgements, Sec. 843-C, P. 417). Generally, only an inspection of the entire record in the first actions will disclose whether the identical issues in controversy in the pending suit was settled in those previous litigations. In this matter, no records, evidence or testimony were presented or heard during the motions hearings the allegation and therefore the claim of res judicata could not and should not have been sustained.

6. Judge Hammond, after granting plaintiff's Motion to Disqualify for prejudice and subsequently recusing herself; over plaintiff's objections, sustained the defense plea of res judicata and dismissed the case and over plaintiff's objections.